FILE COPY

FILED
AUG 1 1973
MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-936

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIE ROBINSON, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

JOSEPH V. GARTLAN, JR.
DOROTHY SELLERS
1801 K Street, N.W.
Washington, D.C. 20006
Counsel for Respondent

Washington, D.C. • CLB PUBLISHERS, INC. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW; JURISDICTION; CONSTITUTIONAL AND STATUTORY PROVISIONS	1
QUESTIONS PRESENTED	2
RESPONDENT'S COUNTER-STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT:	
I. The Search of Respondent Violated His Fourth Amendment Rights Because It Was Not Reasonably Related in Scope to the Circumstances Which Justified Its Initiation	11
A. Introduction	11
B. A search incident to a lawful arrest is subject to the reasonableness test of the Fourth Amendment	12
C. The search procedure contended for in the Government would inflict a very considerable and unexpected intrusion on the person of the arrestee with no corresponding gain in the sole governmental interest justifying that intrusion	13
D. A search having only a protective justification is indistinguishable from the search described in and limited by *Terry v. Ohio*	20
E. Remaining issues	23
II. If the Search of Respondent Was Unreasonable by Fourth Amendment Standards, the Evidence Uncovered by That Search Should Be Suppressed	25
CONCLUSION	33

TABLE OF AUTHORITIES

Cases:	Page
Adams v. Williams, 403 U.S. 143 (1972)	15
Alderman v. United States, 394 U.S. 165 (1969)	25
Beck v. Ohio, 379 U.S. 89 (1964)	12
Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971)	28
California v. Mercurio, 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970)	20
Camara v. Municipal Court, 387 U.S. 523 (1967)	13
Carpio v. Superior Court County of Santa Barbara, 19 Cal. App. 3d 790, 97 Cal. Rptr. 186 (1971)	20
Chimel v. California, 395 U.S. 752 (1969)	*passim*
Davis v. Mississippi, 394 U.S. 721 (1969)	25
Elkins v. United States, 364 U.S. 206 (1960)	25
Katz v. United States, 389 U.S. 347 (1967)	6
Linkletter v. Walker, 381 U.S. 618 (1965)	25
Mapp v. United States, 367 U.S. 603 (1961)	25, 26, 29, 30
People v. Collins, 1 Cal.2d 658, 83 Cal. Rptr. 179, 463 P.2d 403 (1970) (en banc)	32
People v. Overlee, 174 Colo. 202, 483 P.2d 222 (1971) (en banc)	20
People v. Superior Court of Los Angeles County [Simon], 7 Cal.3d 186, 101 Cal. Rptr. 837, 496 P.2d 1205 (1972) (en banc)	11, 23
Preston v. United States, 376 U.S. 364 (1967)	6, 21
Schmerber v. California, 384 U.S. 757 (1966)	12
Simmons v. United States, 390 U.S. 377 (1968)	25
State v. Gwinn, 506 P.2d 187 (Ore. Ct. App. 1973)	20

Page

Strunk v. United States, 41 L.W. 4794 (June 11, 1973) 32

Terry v. Ohio, 392 U.S. 1 (1968) ..... *passim*

United States v. Green, 151 U.S. App. D.C. 35, 465 F.2d 620 (1972) 12

United States v. Mills, ___ U.S. App. D.C.___, 472 F.2d 1231 (1972) (en banc) 11, 12, 19

Weeks v. United States, 234 U.S. 383 (1914) 25, 30

Constitution, Statutes and Regulations:

Fourth Amendment of the United States Constitution ..... *passim*

District of Columbia Metropolitan Police Department, *General Order 23 (June 8, 1971)* 6, 24

District of Columbia Metropolitan Police Department, *General Order 3 (April 24, 1959)* 5

'0 D.C. Code §302(d) (1967 ed.) 2, 5

40 D.C. Code §603 (1973 Supp.) 5

Fed. R. App. P. 40(a) 26

Other Authorities:

American Law Institute, *Search and Seizure*, §110.2(4) 8

Cook, "The Art of Frisking," 40 Ford. L. Rev. 789 (1972) 31, 32

F.B.I. *Uniform Crime Reports–1971* 15

Inbau, "Restrictions In The Law of Interrogation and Confessions," 52 Nw. L. Rev. 77 (1957) 28

International Association of Chiefs of Police, *Annual Law Enforcement Casualty Summary (July 1970-June 1971)* 14

Kamisar, "On the Tactics of Police-Prosecution Oriented Critics of the Courts," 49 Cornell L.Q. 436 (1964) 29

	Page
Note, "Judicial Control of Illegal Search", 58 Yale L.J. 144 (1948)	10, 29, 31
Oaks, "Studying the Exclusionary Rule in Search and Seizure", 37 U. Chi. L. Rev. 665 (1970)	28, 30
Priar and Martin, "Searching and Disarming Criminals," 45 J. Crim. L.C. & P.S. 481 (1954)	9
Traynor, "*Mapp v. Ohio* At Large In The Fifty States," 1962 Duke L.J. 319 (1962)	31
Twain, *Autobiography, Vol. I*	13
Washington Post, March 22, 1967, §A at 30	3
Washington Post, Dec. 8, 1968, Potomac Magazine at 67	3
Zeisel, "F.B.I. Statistics—A Detective Story," 59 A.B.A.J. 510 (May, 1973)	13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-936

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIE ROBINSON, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW; JURISDICTION; CONSTITUTIONAL AND STATUTORY PROVISIONS

The Government's brief accurately refers to (1) the reported and unreported decisions below, (2) the jurisdictional basis for this Court's review, and (3) the relevant constitutional provision, statute and regulation involved.

QUESTIONS PRESENTED

A. Whether the Fourth Amendment prohibition against unreasonable searches is violated when a search incident to a lawful arrest for a traffic violation is initiated as an intensive and thoroughgoing search rather than as a limited protective search for weapons when (1) the sole purpose of the search is protective rather than evidentiary and (2) that purpose can be fully effectuated by a limited search.

B. Whether the Government should be allowed to violate the long-established Exclusionary Rule effectuating Fourth Amendment rights by introducing evidence seized in the course of an unconstitutional search pursuant to a traffic offense at the offender's trial on charges unrelated to that offense.[1]

RESPONDENT'S COUNTER-STATEMENT OF THE CASE

The District of Columbia Department of Motor Vehicles revoked respondent's operator's permit on September 28, 1962. Respondent signed a receipt for the notice of revocation on March 23, 1963 (A. 16). Five years later, on April 23, 1968, Officer Richard Jenks of the District of Columbia Metropolitan Police Department arrested respondent for the offense of driving after revocation pursuant to 40 D.C. Code §302(d) (1967 ed.)[2] and searched respondent incident to that arrest

---

[1] Respondent's reservations as to whether this issue is properly before the Court are more fully set forth at pages 25-26, *infra*.

[2] That arrest was engendered by a prior encounter between respondent and Officer Jenks—a "routine spot check"—during the course of which Officer Jenks noticed that respondent's date of birth differed on the two pieces of identification which he

(A. 8). The search uncovered a crumpled cigarette package containing 14 heroin capsules in the outer breast pocket of respondent's car-coat (A. 34-37). A majority of the court below concluded that the search violated respondent's Fourth Amendment rights because it was not strictly tied to and justified by the protective purpose which render its initiation possible. (Pet. A. 5a).

The Search

The remand hearing focused in part on the mechanics of Officer Jenks' search of respondent (A. 36-42; 48-52). Although Officer Jenks ordinarily employs a "spread-eagle" technique in searching those persons whom he has arrested (A. 42), the search in question commenced with the two men standing face to face (A. 36)[3]; Officer Jenks then placed his hands on respondent's chest (A. 36). At that time his right hand felt an object in respondent's left outer breast pocket (A. 36). The object was not visible

---

tendered (A. 5). During the four-day interval between the "routine spot check" and the arrest, Officer Jenks checked both the traffic files and the central criminal files on respondent (A. 6-7). Those files revealed that respondent's correct date of birth was 1927 and that respondent's application for a temporary operator's permit indicated that there had been no prior revocation (A. 17). Officer Jenks specializes in arresting those persons who drive on revoked permits and who obtain permits by misrepresentation (A. 32); "Supercop", Washington Post Potomac Magazine, December 8, 1968 at 67; "Police Private Jenks, 'Revocation Doctor' Wins Another Case", Washington Post, March 22, 1967 §A at 30. Indeed, Officer Jenks had, as of October 1971, made approximately 4000 such arrests (A. 57).

[3]Officer Jenks departed from his usual custom because he was physically much larger than respondent and anticipated no problem of control (A. 42).

and, as Officer Jenks testified, he extracted it and thoroughly examined it:

> Q. What did you do after you felt the jacket pocket?
>
> A. I went into the pocket and pulled this object out and observed it to be a crumpled up cigarette package. As I felt the package, I could feel objects in the package but I couldn't tell what they were. I opened it and [looked] and observed what they were.
>
> Q. Do you recall now whether or not you suspected what was inside the cigarette package or whether you by feel had an idea what was in there?
>
> A. I could feel the package and I knew they weren't cigarettes but I don't remember if I knew what they were or not.

(A. 37)

Officer Jenks placed the cigarette package in his own pocket and continued searching (A. 38). He was unable to recall the precise sequence in which he searched respondent; however, the relevant features included a search around respondent's waistline and down his trouser legs and down into his pockets (A. 38). Officer Jenks was too embarrassed to search respondent's groin area (A. 51) and did not remove anything else from respondent's pockets (A. 38).

The record and the Government's brief indicate that the area of disagreement between the parties is exceedingly narrow. There appears to be agreement in the following statements:

1. *Ordinarily, no search or frisk is permissible incident to a traffic violation.*

The Government's brief correctly states at 31-32, "If respondent's offense were a minor infraction (*e.g.* passing a stop sign or driving without lights), where a summons were to be served and no arrest contemplated, no search of his person would have been permissible; only a frisk would have been justifiable and then only if Officer Jenks had "reason to believe that he [was] dealing with an armed and dangerous individual." . . . ." (citation omitted)

2. *Respondent was arrested for a traffic offense which necessitates a summary arrest.*

Within the District of Columbia, most traffic offenses are defined (and the penalties for violation thereof established) by the City Council and the Mayor/Commissioner. 40 D.C. Code §603 (1972 Supp.); (Pet. A. 66a). The offense of driving after revocation for which respondent was arrested is an exception to this principle: the United States Congress has defined the offense and prescribed the minimum and maximum penalties. 40 D.C. Code §302(d) (1967 ed.). Driving after revocation is a relatively serious traffic offense and the police regulations[4] "reasonably required that Office Jenks take [respondent] into custody and transport him to the stationhouse" (Pet. A. 49a) (concurring opinion).

[4]District of Columbia Metropolitan Police Department General Order No. 3, Series 1959 (April 14, 1959).

3. *There was no evidentiary basis for the search of respondent.*

The legitimate objectives of an arrest-based search of the person are (1) seizure of fruits, instrumentalities and other evidence of the crime for which the arrest is made in order to prevent its destruction or concealment, and (2) removal of any weapons which the arrestee might use to resist arrest, effect escape, or inflict injury on the arresting officer or himself. *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *Katz v. United States*, 389 U.S. 347, 357 n.20 (1967); *Preston v. United States*, 376 U.S. 364, 367 (1967); (A. 88-89). These two objectives are commonly referred to as the evidentiary and protective bases of the search. The Government has conceded that the search of respondent was totally lacking in evidentiary purpose (A. 102) (Government's brief at 20).[5] As Judge Wilkey succinctly stated in his dissent below, "this was not an evidentiary search." (Pet. A. 65a). Thus, the search in question was motivated solely by protective justifications.

---

[5] That concession was inescapable both in the particulars of this case and as a general proposition relating to the offense of driving after revocation. As noted previously, at the time of the April 23 arrest, Officer Jenks had an airtight case against respondent for the offense of driving after revocation based on his examination of the traffic records which included respondent's signed receipt for the notice of revocation. (Government's brief at 20).

See also, Metropolitan Police Department General Order 23, June 8, 1971; which reads in pertinent part:

> Full custody traffic arrest. An officer arrests a driver of a vehicle for driving after revocation. . . . Areas beyond his immediate control should not be searched because there is no probable cause to believe that the vehicle contains fruits, instrumentalities, contraband or evidence of the offense of driving after revocation.

4. *Officer Jenks did not perceive respondent as armed or dangerous.*

The Government concedes that "... in searching respondent, [Officer Jenks] was not motivated by a feeling of imminent danger and was not specifically looking for weapons" (Brief at 34). Respondent agrees. The present case is devoid of any evidence that Officer Jenks had specific and articulable facts supporting a reasonable belief that respondent was armed or dangerous. Indeed, Officer Jenks admitted that he had no specific purpose in mind when he searched respondent, "I just searched him, I didn't think about what I was looking for. I just searched him" (A. 45).

5. *Officer Jenks' search complied with District of Columbia Metropolitan Police Department instructions*

The search by Officer Jenks was in conformity with current police practice in the District of Columbia which allows a full search at the time of all in-custody arrests. Sergeant Donaldson so testified:

> Q. Now, directing your attention to the field type search. When is a field search instructed to be conducted by a police officer?
> A. At any time he makes a full custody arrest. That is where he would arrest a subject and subsequently transport him to a police facility for booking.
> (A. 87-88).

6. *Respondent was searched rather than frisked.*

The Government has consistently conceded[6] that Officer Jenks' search of respondent exceeded the permis-

[6] *See*, Pet. A. 8a-9a and accompanying text.

sible scope of a limited protective search for concealed weapons. For purposes here, the one crucial difference between a protective weapons search—a frisk—and a full (or so-called field) search is that the arresting officer conducting a full search is expected to routinely examine any object he might find on the suspect; the officer conducting a frisk may remove and examine only those objects he reasonably believes may be weapons (A. 88).

Had Officer Jenks conducted a frisk or pat-down type search, it is unlikely that the contents of the cigarette package would have been examined. This was brought out on the cross-examination of Sgt. Donaldson:

> Q. So that if an officer conducting a pat-down put his hand on the left breast pocket of an outer garment, a car-coat ... and felt in there something that gave when it was squeezed, did not indicate that it had any sharp edges, did not indicate that it was made of metal, did not appear to be of appreciable size, under the instruction and training you give, he should have passed on without going into that pocket, right?
>
> A. Yes, sir.
>
> (A. 96).

There is, however, a gossamer dividing line between frisk and search. Certainly a frisk, even if it may "realistically be characterized as something less than a 'full' search" is nevertheless a serious and considerable intrusion. *Terry v. Ohio*, 392 U.S. 1, 26 (1968). The by-now standard definition of the limits[7] of a frisk approved in *Terry v. Ohio* illustrates the point:

---

[7] As generally interpreted, a frisk commences with an external patting of the suspect's outer clothing. *Terry v. Ohio, supra*, 392 U.S. at 29-30; ALI, Search and Seizure, §110.2(4), (cited in the dissenting opinion below at Pet. A. 75a n.33.). District of Columbia police recruits are taught the mechanics of frisking in accordance with these interpretations (A. 87).

> [T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.
> *Terry v. Ohio, supra,* 392 U.S. at 17 n.13 quoting Priar & Martin, "Searching and Disarming Criminals," 45 J. Crim. L.C. & P.S. 481 (1954).

Secondly, a protective frisk may at any time *evolve* into a full search if the suspicions of the frisking officer are reasonably aroused.[8] This is precisely the two-step frisk-search procedure approved by the Court in *Terry v. Ohio;* the officer in *Terry* "did not place his hands in [the suspects'] pockets or under the outer surface of their garments *until* he had felt weapons . . . ," 392 U.S. at 29-30 (emphasis added).

SUMMARY OF ARGUMENT

A search incident to a valid arrest is nevertheless a search and is therefore subject to the Fourth Amendment prohibition against unreasonable searches. In determining that the non-evidentiary search of respondent was unreasonable, the majority below correctly balanced the sole governmental interest—that of assuring that the arrestee with whom the police officer deals is not armed—against the arrestee's considerable expectation of privacy. The question presented is not whether the process of arrest, even for a traffic offense, is frequently perilous. Rather the question is whether or not the danger to the arresting officer is greater when the search is commenced as a frisk

[8] That concept is inapplicable to the facts of this case inasmuch as Officer Jenks never articulated a suspicion that the crumpled cigarette package contained a weapon.

rather than as a full search. In this regard, neither the Government's statistics nor the testimony of the Government's experts at the remand hearing support the Government's position that a full search at the outset is necessary. The Government's elevation of existing search practices of the District of Columbia Metropolitan Police Department to the level of constitutional reasonableness was specifically rejected by even the dissenting judges below (Pet. A. 77a).

In all relevant aspects, the non-evidentiary search of respondent corresponds precisely to the Fourth Amendment intrusion described by the factual situation in *Terry v. Ohio*, 392 U.S. 1 (1968), and should be limited in accordance with *Terry* and its companion cases.

The Government's attack in this Court on the Exclusionary Rule is surprising since that topic never received more than footnote treatment below. The deterrent effect of the Exclusionary Rule is greatest when, as here, the police purpose of obtaining convictions by means of the unconstitutional search is evident. The argument that the Exclusionary Rule allows the guilty to go free is simply an argument that, in matters of criminal justice, the end is more important than the constitutional means. Note, "Judicial control of Illegal Search", 58 Yale L.J. 144, 161 (1948). Finally, as a practical matter, there is no acceptable alternative for enforcing Fourth Amendment rights.

ARGUMENT

I.

THE SEARCH OF RESPONDENT VIOLATED HIS FOURTH AMENDMENT RIGHTS BECAUSE IT WAS NOT REASONABLY RELATED IN SCOPE TO THE CIRCUMSTANCES WHICH JUSTIFIED ITS INITIATION.

A. Introduction

Respondent stresses at the outside of this discussion the exceptional narrowness, in terms of both the time reference and the likelihood of recurrence, of the main issue presented for review. The time frame under consideration extends only from the time the police officer makes a traffic arrest requiring immediate custody until the officer and suspect arrive at the stationhouse.[9]

The four key factors triggering the decisions below are (1) a search is conducted incident to a lawful arrest rather than pursuant to a search warrant; (2) the underlying offense, although one which necessitates a summary arrest, is at the same time one for which it is unreasonable to assume that the arrestee will be in possession of fruits, instrumentalities, or other instruments of the offense; (3) a reasonably prudent police officer would not be warranted in the belief that the arrestee was armed or otherwise presented a threat to the officer's safety; and (4) the controversial item would be uncovered by a full search and not by a properly conducted frisk.

---

[9] If the arrestee is to be detained in the cell block—rather than released on collateral or bond—a different and more thorough search procedure comes into play. *See, United States v. Mills*, ___ U.S. App. D.C. ___, 472 F.2d 1231 (1972); *People v. Superior Court of Los Angeles County [Simon]*, 7 Cal.3d 186, 101 Cal. Rptr. 837, 853, 496 P.2d 1205, 1221 (1972) (en banc).

B. A Search Incident to a Lawful Arrest Is Subject to the Reasonableness Test of the Fourth Amendment.

The fact that respondent was lawfully arrested did not confer *per se* reasonableness on the attendant search. Under the Fourth Amendment the validity of all searches and seizures turns upon their reasonableness, and even when there is a valid arrest the search must be reasonably incident to the arrest. *United States v. Mills*, ___ U.S. App. D.C. ___, 472 F.2d 1231, 1234 (1972) (en banc); *See also, Chimel v. California*, 395 U.S. 752, 762 (1969), "A similar analysis [that the scope of a search must be strictly tied to and justified by the circumstances which rendered its initiation permissible] underlies the 'search incident to arrest' principle and marks its proper extent"; *Beck v. Ohio*, 379 U.S. 89, 91 (1964), "There are limits to the permissible scope of a warrantless search incident to a lawful arrest . . ."; *Schmerber v. California*, 384 U.S. 757, 769 (1966). Indeed, two of the dissenting judges below have recently stated:

> Sanction of searches incident to arrest, however, 'does not mean that [the person arrested] is subject to any and all searches that the arresting officer may wish to conduct'. . . . The touchstone both as to whether the search is warranted and the propriety of its scope remains reasonableness.
> *United States v. Green*, 151 U.S. App. D.C. 35, 37, 465 F.2d 620, 622 (1972) (Tamm and Wilkey, J.J.) (citation omitted).

Thus, the fact of arrest does not shortcut the discriminative analysis of reasonableness required when Fourth Amendment rights are in issue.

C. The Search Procedure Advocated by the Government Would Inflict a Very Considerable and Unexpected Intrusion on the Person of the Arrestee With No Corresponding Gain in the Sole Governmental Interest Justifying That Intrusion.

The assessment of the reasonableness of the search of respondent, as with all Fourth Amendment intrusions, commences with a balancing of the Government's need to search against the invasion which the search entails. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

The singular governmental interest which purportedly justified the search of respondent is the protection of the arresting officer.[10] The Government argues that every arrest—including those for traffic offense—are inherently dangerous and supports this argument with a mass of statistics. That statistical approach is questionable in general[11] and, in the particulars of this case, lacking in probative value. As the Government acknowledges, *there are no specific figures which relate to the precise problem at hand:* "Specific figures for custodial arrests for traffic

---

[10]A concealed weapon might also be used by the arrestee to inflict injury upon himself (A. 89) and thus the protective purpose of the search encompasses the safety of the individual arrested as well as the safety of the arresting officer. However, since presumably the same weapons would inflict either type of injury, a search sufficient to protect the officer would also suffice to protect against self-injury by the arrestee. (Pet. A. 32 n.31).

[11]Disraeli's admonition on the uses of statistics is equally forceful today: "There are three kinds of lies: lies, damned lies, and statistics." (quoted by Mark Twain in *Autobiography*, Vol. I, p. 246.). In this regard, the F.B.I. statistics on which the Government relies are particularly suspect: *See*, Zeisel, "F.B.I. Statistics—A Detective Story", 59 A.B.A.J. 510 (May, 1973).

offenses are unavailable. Nor is information available under the Uniform Crime Reporting Program that relates specifically to the number of policemen killed or assaulted after a "frisk" or "pat-down" had been completed." (Government's brief at 23 n.9).[12]

Moreover, the F.B.I. statistics disclose only half the picture. They are *absolute* figures as to the number of police casualties per activity; they fail to indicate the *relative* frequency with which law enforcement officers engage in each activity. This incommensurability did not escape the majority below: "These statistics, however, must be placed in proper perspective. Considering the millions of traffic arrests made annually, the fact remains that these arrests constitute possibly the safest of all law enforcement activities." (Pet. A. 24a n. 22).[13]

The remainder of the Government's statistics are basically irrelevant. Judge Wilkey's dissent below cites certain statistics taken from the International Association of Chiefs of Police Annual Law Enforcement Casualty Summary (July 1970 - June 1971). (Pet. A. 64a n. 20). Other portions of that publication indicate that the category of weapons which inflicted more police casualties than any other category is "personal weapons"–defined as "hands, feet, teeth, etc." *Id.*, at 40, 47. That statistic is

---

[12]After a presumably zealous search of existing records, the Americans For Effective Law Enforcement, the International Association of Chiefs of Police and the District of Columbia Metropolitan Police Department, in their *amicus curiae* brief at 17-18, are able to "document" only seven such incidents in the last *twenty years* and only two of those resulted in injury. With all due respect, the Government's solution is bigger than the problem.

[13]The majority's criticism was directed to the statistics compiled by the International Association of Chiefs of Police in its Annual Law Enforcement Casualty Summary (July 1970 - June 1971). The criticism applies with equal validity to the F.B.I. statistics.

borne out by the F.B.I. Uniform Crime Reports–1971 at 164 Table 60: 81% of assaults on police officers during 1971 were with "hands, fists, feet, etc." Obviously, those weapons will be available to the arrestee *regardless of the thoroughness of the search.* Secondly, the Government's statistics relating to homicides during a traffic arrest do not clearly bear on the issue at hand because they do not identify at what point in the arrest transaction the homicide occurs. Indeed, these statistics indicate that the homicide is likely to occur when the officer *approaches* the vehicle rather than during the subsequent search or trip to the stationhouse. (Government's brief at 23, citing *Adams v. Williams,* 407 U.S. 143, 148 (1972). Additionally, the statistics referred to in *Adams, supra,* indicate that the vast, vast majority of police fatalities are inflicted by gunshot rather than by cleverly designed clandestine weaponry. *See also, Terry v. Ohio, supra,* 392 U.S. at 24 n.21. Finally, because of the narrow time reference of this case and because of the Government's insistence that the danger to the arresting officer flows from the fact of arrest "with its attendant proximity, stress and uncertainty," the most relevant category from the F.B.I. data is "handling, transporting, custody of prisoners" which, after "civil disorders," and "unprovoked mentally deranged" is the least dangerous police activity. F.B.I. Uniform Crime Reports–1971, at 43 Table 22.

The real problem with the statistical approach is that it simply misses the point of this controversy. Respondent does not deny that the process of arrest, even for a traffic offense, is occasionally perilous. However, the question before the Court is not whether that danger exists but rather the extent to which it is diminished when a full search rather than a protective search for weapons is

conducted. The Government had full opportunity at the remand hearing to establish that a full search rather than a frisk is required to fullfil the protective purposes of a non-evidentiary search. The testimony of its expert witnesses did not support its position.

Officer Jenks entered the courtroom with a .22 magnum Derringer in the breast pocket of his overcoat; the weapon was roughly five inches long and ¾ inches wide. (A. 45). On cross-examination, Officer Jenks testified that, in the course of a frisk corresponding to the *Terry v. Ohio* definition of the term, he would have detected the gun since his suspicions would have been sufficiently aroused to have investigated the object further.[14]

Ronald Newhouser, a recognized expert[15] in clandestine weaponry, also testified for the Government at the

---

[14]Q. Let's get to that. Specifically, if you found it in the breast pocket of the suit that I am wearing or the suit that you are wearing and you were conducting a pat-down and felt an object like that, would not your suspicions be aroused as to what it was?

A. Yes.

Q. And, in the light of your experience, wouldn't you be very suspicious that it was a weapon?

A. Well I would be suspicious that it was a weapon but with this type of weapon it would be hard to detect what it was.

Q. Well, you wouldn't let those suspicions go unfounded, but you would reach in and find out what it was, wouldn't you?

A. Yes, sir.

Q. And because you would be apprehensive that it was a weapon?

A. I would reach in to find out if it was a weapon for my own protection.

(A. 50).

[15]Mr. Newhouser is supervisor of the National Bomb Data Center; he has taught courses in clandestine weaponry both internationally (to the Thai military and civilian authorities, for example) and domestically (to certain metropolitan police forces and to military and federal agencies) (A. 60).

remand hearing. (A. 59-82). During the course of his testimony Mr. Newhouser removed from his person twenty-five weapons that could kill or incapacitate. (A. 64). Under cross-examination and confronted with the *Terry v. Ohio* definition of frisk, Newhouser testified that all of the twenty-five concealed weapons would be discovered:

> Q. Now, with respect to a search meeting the description I just read [the Priar & Martin definition of frisk in *Terry v. Ohio*] can you tell me which of the weapons carried on your person into the courtroom today would, in your expert opinion, still escape detection?
>
> A. If it was conducted as you read that description and it were conducted at a time and a place where you had no outside pressures, you would probably get almost all of them. I can't think of any of them that might be missed.
>
> (A. 81)

On the immediately following redirect examination Newhouser explained that his answer on cross-examination had included the concept that "as you found the suspicious items you would have to follow the lead." (A. 82). That concept is, of course, well within the concept of frisk authorized by *Terry v. Ohio.*

In a sense, Newhouser's testimony proved too much. He testified on cross-examination that the only means of eliminating *all* possible risk to the arresting officer is to allow him to spread-eagle the arrestee, strip him of his clothing and examine it, and feel into the arrestee's body cavities. (A. 79). He also testified that type of search is peculiarly ill-suited to an on-the-street arrest (A. 79).

Finally, the Government called Sgt. Donaldson of the District of Columbia Metropolitan Police Department.

Sgt. Donaldson is one of the two members of the force responsible for teaching the mechanics of conducting a search to police recruits. (A. 86). He testified that within his own experience and his knowledge of other officers' experience the following weapons had been encountered during in-custody searches: ice picks, revolvers of all kinds, sawed-off shotguns, knives, letter openers and razor-blade box openers. (A. 85). On cross-examination, Sgt. Donaldson conceded that all of these weapons would be detected in the course of a *Terry*-type frisk. (A. 98-100).

Thus, in focusing on the governmental interest of protection which was the sole justification for the search of respondent, neither the Government's statistics nor the testimony of the Government's witnesses at the remand hearing support its position that a full search rather than a carefully conducted frisk diminishes the potential danger to an arresting officer. Rather, that hearing proved only that the strip-search necessary to afford total protection for the arresting officer is, aside from the constitutional questions involved, totally unfeasible for on-the-street full custody arrest.

Turning to the interest of the individual—the other half of the balancing equation—it is clear that even a frisk is "a serious intrusion upon the sanctity of the person . . ." *Terry v. Ohio, supra,* 392 U.S. at 17. The Government assumes that an arrestee has only a "minimal interest of privacy remaining after a lawful arrest" and that a post-arrest search is only a "small additional intrusion" (Government's brief at 29). That assumption is contrary to law. First, as noted earlier, even a search incident to a lawful arrest must be strictly tied to the circumstances rendering its initiation permissible, *Chimel v. California,* 395 U.S. 752, 762 (1969); any unnecessary or unjus-

tifiable intrusion, however small, is therefore unreasonable. Secondly, the Government deliberately disregards the impact on the present case of the *en banc* decision of the court below in *United States v. Mills*, ___ U.S. App. D.C. ___, 472 F.2d 1231 (1972).[16]

Mills was arrested for the traffic offense of driving without a proper permit. As with driving after revocation, that offense necessitates a summary arrest and a trip to the stationhouse (Pet. A. 25a n.23). At the stationhouse, Mills was required to relinquish the contents of his pockets which included twenty-two capsules of heroin and thirty-three capsules of cocaine. *United States v. Mills, supra,* 472 F.2d at 1234. The *en banc* six to four decision reversed the ensuing narcotics conviction and ordered the suppression of the narcotics evidence on the grounds that the pocket search violated the Fourth Amendment requirement of reasonableness because Mills had been denied his opportunity to post collateral and avoid further detention.

Applying *Mills* to the present case, it is problematical whether respondent would have been fully searched at the stationhouse had Officer Jenks conducted only a frisk at the time of the arrest. Respondent could have been released for the traffic offenses without any stationhouse detention or search of his person by posting either cash or bail bond in the requisite amounts. (Pet. A. 36a n.35).

Mills is relevant to the case at hand for the following reasons:

(1) In the District of Columbia a search incident to a lawful in-custody arrest cannot be viewed as a precursor of

---

[16]Mills was reargued *en banc* on February 26, 1971 in tandem with the first *en banc* reargument of the instant case. *The Government did not petition this Court for a writ of certiorari in Mills.*

Sgt. Donaldson is one of the two members of the force responsible for teaching the mechanics of conducting a search to police recruits. (A. 86). He testified that within his own experience and his knowledge of other officers' experience the following weapons had been encountered during in-custody searches: ice picks, revolvers of all kinds, sawed-off shotguns, knives, letter openers and razor-blade box openers. (A. 85). On cross-examination, Sgt. Donaldson conceded that all of these weapons would be detected in the course of a *Terry*-type frisk. (A. 98-100).

Thus, in focusing on the governmental interest of protection which was the sole justification for the search of respondent, neither the Government's statistics nor the testimony of the Government's witnesses at the remand hearing support its position that a full search rather than a carefully conducted frisk diminishes the potential danger to an arresting officer. Rather, that hearing proved only that the strip-search necessary to afford total protection for the arresting officer is, aside from the constitutional questions involved, totally unfeasible for on-the-street full custody arrest.

Turning to the interest of the individual—the other half of the balancing equation—it is clear that even a frisk is "a serious intrusion upon the sanctity of the person . . ." *Terry v. Ohio, supra,* 392 U.S. at 17. The Government assumes that an arrestee has only a "minimal interest of privacy remaining after a lawful arrest" and that a post-arrest search is only a "small additional intrusion" (Government's brief at 29). That assumption is contrary to law. First, as noted earlier, even a search incident to a lawful arrest must be strictly tied to the circumstances rendering its initiation permissible, *Chimel v. California,* 395 U.S. 752, 762 (1969); any unnecessary or unjus-

tifiable intrusion, however small, is therefore unreasonable. Secondly, the Government deliberately disregards the impact on the present case of the *en banc* decision of the court below in *United States v. Mills*, ___ U.S. App. D.C. ___, 472 F.2d 1231 (1972).[16]

Mills was arrested for the traffic offense of driving without a proper permit. As with driving after revocation, that offense necessitates a summary arrest and a trip to the stationhouse (Pet. A. 25a n.23). At the stationhouse, Mills was required to relinquish the contents of his pockets which included twenty-two capsules of heroin and thirty-three capsules of cocaine. *United States v. Mills, supra*, 472 F.2d at 1234. The *en banc* six to four decision reversed the ensuing narcotics conviction and ordered the suppression of the narcotics evidence on the grounds that the pocket search violated the Fourth Amendment requirement of reasonableness because Mills had been denied his opportunity to post collateral and avoid further detention.

Applying *Mills* to the present case, it is problematical whether respondent would have been fully searched at the stationhouse had Officer Jenks conducted only a frisk at the time of the arrest. Respondent could have been released for the traffic offenses without any stationhouse detention or search of his person by posting either cash or bail bond in the requisite amounts. (Pet. A. 36a n.35).

Mills is relevant to the case at hand for the following reasons:

(1) In the District of Columbia a search incident to a lawful in-custody arrest cannot be viewed as a precursor of

---

[16]Mills was reargued *en banc* on February 26, 1971 in tandem with the first *en banc* reargument of the instant case. *The Government did not petition this Court for a writ of certiorari in Mills.*

an inevitable stationhouse search; it must stand or fall on its own reasonableness at the time.

(2) A person lawfully arrested in the District of Columbia does have a considerable expectation of privacy—extending to the contents of his pockets—up to the time there is no alternative to cell block detention.[17]

In summary, in challenging the correctness of the decision below, the Government simultaneously underestimates the arrestee's expectation of privacy at the time of the arrest and overestimates the danger to the arresting officer when "only" the *Terry*-type frisk is conducted. Sanctity of the person from unreasonable intrusions by governmental agents is the norm in this country. The procedure contended for by the Government in this case would violate that norm by inflicting a very considerable and unexpected intrusion on the person of the arrestee without any corresponding gain in the governmental interest justifying that intrusion. The decision below correctly balances the competing Fourth Amendment interests and should be affirmed.

D. A Search Having Only a Protective Justification Is Indistinguishable From the Search Described in and Limited by *Terry v. Ohio*.

The Government improperly characterizes *Terry v. Ohio*, 392 U.S. 1 (1968), as a pre-arrest case and as

---

[17]The result in Mills—that stationhouse searches are not appropriate when the arrestee may be released without incarceration—is not peculiar to the District of Columbia. *See, California v. Mercurio*, 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970); *Carpio v. Superior Court, County of Santa Barbara*, 19 Cal. App. 3d 790, 97 Cal. Rptr. 186 (1971); *People v. Overlee*, 174 Colo. 202, 483 P.2d 222 (1971) (en banc); *State v. Gwinn*, 506 P.2d 187 (Ore. Ct. App. 1973).

inapplicable to a lawful arrest situation (Government's brief at 16-17). In point of fact, *Terry v. Ohio* is a *Fourth Amendment* case rather than a "stop and frisk" case: that is the entire thrust of part II of the *Terry* opinion, *id.* at 16-20, in which the Court "emphatically" rejected the notion that police conduct at the pre-arrest level is outside the purview of the Fourth Amendment and found "danger" in the logic which distinguished between a frisk and a search.[18] *Id.* at 16-17.

The Court in *Terry v. Ohio* attempted to distinguish between a protective search for weapons and a search incident to arrest. *Id.* at 25-26. That distinction is invalid here because it is based on the premise that an arrest-based search—although justified in part by the need to protect the arresting officer from assault with a concealed weapon—"is also justified on other grounds . . . and can therefore involve a relatively extensive exploration of the person" *Id.* at 26. In support of the reference to "other grounds" the Court cited *Preston v. United States,* 376 U.S. 364, 367 (1954), which holds:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime. . . ."

Thus, the "other grounds" which arguably support a distinction between the scope of a limited protective

---

[18]The Court stated:

> In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. *Id.* at 18 n.15.

search for weapons and a search incident to a lawful arrest are none other than the evidentiary grounds lacking in this case. Put another way, when a search concededly has no evidentiary purpose, the distinction between a full search and a *Terry*-type search vanishes.

In *Terry*, this Court held that a Fourth Amendment intrusion having *only* a protective justification must be something less than a full scale search.

> "The sole justification of the search ... is the protection of the police officer and others nearby and it must, therefore, be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer." *Id.* at 29.

The Court held that a pat-down or frisk was an appropriately limited intrusion even though the officer in *Terry v. Ohio* had reason to believe that the individual with whom he was dealing was armed and dangerous. As noted above, Officer Jenks did not believe that respondent was armed and dangerous. The Government, nevertheless, asks this Court to hold that where the protective justification is less specific and compelling than in *Terry v. Ohio*, the Fourth Amendment intrusion may be more extensive.[19]

The Government defends its position on the grounds that an arrest engenders a prolonged and stressful period of proximity between officer and arrestee (Government's brief at 23). The majority opinion below concedes that

---

[19]The Government's position, put another way, is that as between two officers searching for weapons rather than evidence, the officer who has reason to believe that suspect is carrying a weapon must commence his search with a patdown, while the officer who has no reason to believe that the suspect is armed may make a full-blown search at the outset.

an arrest is potentially more dangerous than a stop-and-frisk, not because of a greater likelihood that a person taken into custody is armed but rather because of "the increased likelihood of danger to the officer *if* in fact the person is armed". (Pet. A. 27a citing *People v. Superior Court of Los Angeles County [Simon]*, 101 Cal. Rptr. 837, 857, 496 P.2d 1205, 1225 (1972) (en banc).

However, even if that difference exists,[20] the decision below makes allowance for it by permitting an arresting officer to conduct the weapons search in *every* in-custody arrest situation without regard to whether he reasonably believes the suspect is armed.

E. Remaining Issues

The remaining issues raised by the Government relating to the reasonableness of the search of respondent do not require extended discussion.

1. *The existing search practices of the District of Columbia Metropolitan Police Department are not determinative of Fourth Amendment reasonableness.*

Respondent agrees that Officer Jenks' search of respondent at the time of the in-custody arrest fully

---

[20]The necessity for a reliable protective search appears equally important in the stop-and-frisk situation as in the arrest situation. The stop-and-frisk situation creates the possibility that the suspect frisked will be loosed on his unarmed fellow citizens. Moreover, in a *Terry v. Ohio* situation, the police have only one chance (and that chance is a frisk) to assure the protection of themselves and others; the police in an arrest situation may well have the opportunity to re-search the suspect at headquarters. The continuing relationship between officer and arrestee may include the opportunity to conduct subsequent searches.

complied with existing departmental practice. However, as the dissent below recognized, "The fact that Officer Jenks was following routine police procedure of course does not validate either the decision to search or the scope of the search." (Pet. A. 77a). The benefits of standardization enumerated by the Government[21] are benefits which would result from any standardized instruction regardless of its content. The genesis of the existing search practices is unknown; there is nothing in the record to support the Government's contention that the existing methodology constitutes the distilled wisdom and experience of the entire District of Columbia police force (Government's brief at 10, 31).

2. *Implementation of the majority decision below is eminently feasible.*

Respondent disagrees with the Government's position that the decision below draws "an artificial and impractical" line (Government's brief at 29). It is the same line which this Court drew in *Terry v. Ohio.* Moreover, there are only a few offenses for which the arresting officer could not reasonably assume that the arrestee possessed fruits, instrumentalities, or other evidence of the offense. (Pet. A. 18a); *Chimel v. California,* 395 U.S. 752, 773 (1969) (dissenting opinion of Justice White). And, to some extent, these non-evidentiary offenses have been previously identified by the District of Columbia police. *See,* District of Columbia Metropolitan Police Department General Order 23 (June 8, 1971) quoted at page 6, *supra.*

---

[21]The standardized procedures are "designed to maximize simplicity, clarity of instructions, and standardization of procedures . . . so that in time of stress he will instinctively take the correct action." (Government's brief at 20).

II.

IF THE SEARCH OF RESPONDENT WAS UNREASONABLE BY FOURTH AMENDMENT STANDARDS, THE EVIDENCE UNCOVERED BY THAT SEARCH SHOULD BE SUPPRESSED.

The Government urges this Court, if it finds that the search of respondent infringed his Fourth Amendment rights, to nevertheless declare the evidence uncovered by that search admissible at trial (Government's brief at 37-45). That position is contrary to all prior relevant decisions of this court which, as the Government concedes, have allowed "no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof." *Davis v. Mississippi*, 394 U.S. 721, 724 (1969); *see also, Weeks v. United States*, 234 U.S. 383 (1914); *Alderman v. United States*, 394 U.S. 165, 171 (1969); *Elkins v. United States*, 364 U.S. 206 (1960); *Mapp v. Ohio*, 367 U.S. 603 (1961); *Simmons v. United States*, 390 U.S. 377, 389 (1968); *Linkletter v. Walker*, 381 U.S. 618, 636 (1965).

Prior to addressing this question on the merits, respondent makes the following preliminary observations:

1. The Government asks this Court to overturn sixty years of consistent precedent. A determination of that seriousness and magnitude should be undertaken only after careful study and the full operation of the adversary system. Yet, until this case reached the Supreme Court level, the question of whether the Exclusionary Rule should be partially abandoned was, at best, a peripheral issue in this case. The Government raised it most strenuously in its "Petition for Rehearing and Suggestion for Rehearing En Banc." Respondent could not oppose

that petition, Fed. R. App. P. 40(a). Subsequently, the Government footnoted the point in its February, 1971 Supplemental Memorandum. The majority opinion below, following the Government's lead, accorded the topic half a footnote (Pet. A. 32a n.31).

More importantly, the thrust of the Government's argument against the Exclusionary Rule below was that its deterrent effect was unavailing in the circumstances of this case. In this Court, the Government has changed its emphasis to the argument that inadvertent, honest, and technical invasions of Fourth Amendment rights should be outside the scope of the Exclusionary Rule (Government's brief at 40-45). There is nothing in the record below, such as testimony from police officials in States which had not voluntarily adopted the Exclusionary Rule prior to *Mapp v. Ohio*, which bears either on the deterrent effect of the Exclusionary Rule or on the relative number of maliciously-motivated searches with and without the Rule. Respondent respectfully suggests that this issue has not received the full focus and consideration of the courts or counsel below as to render it appropriate for decision in this forum.

2. A major change in the application of the Exclusionary Rule would expose the Court to the type of criticism foreseen by Justice Harlan in his dissent in *Mapp v. Ohio*, 367 U.S. 643, 677 (1961), "I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions." *See also, Chimel v. California*, 395 U.S. 752, 771-72 (1969) (dissenting opinion of Justice White).

Respondent's objections to the merits of the Government's proposal are as follows:

1. The search of respondent presents a factual situation in which the deterrent effect of the Exclusionary Rule is maximized. The Rule's deterrent effect on lawless police conduct is variable:

> "Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of some other goal."
> *Terry v. Ohio, supra,* 392 U.S. at 14.

The present case is one in which obtaining respondent's conviction—*on the narcotics offense*—was the overriding justification for the search. Officer Jenks checked respondent's criminal records prior to arresting him and was therefore aware of his past narcotics involvement (A. 7) (R. 26). The Government's protestation that the search was conducted only to assure the protection of Officer Jenks—and not in order to obtain some sort of conviction—is refuted by the method of that search. In avoiding respondent's groin area, Officer Jenks spurned the full protection which was available to him even under a frisk. The protective justification of the search is premised on the theory that respondent was potentially *dangerous as a traffic offender;* respondent was never even booked on the traffic charges (R. 26). There is in fact some tension between the Government's dual position that, on the one hand, the search was motivated solely by protective purposes and, on the other, that the evidence obtained should be admissible. If

the search is purely protective, the discovery of harmless items should be immaterial.[22]

Geographically speaking, within the District of Columbia the Exclusionary Rule has a substantial deterrent effect. The Rule has been criticized on the grounds that the sanction becomes decreasingly effective as the judicial proceeding requiring the suppression becomes increasingly remote from the offending officer.[23] See, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 416-17 (1971) (dissenting opinion of Chief Justice Burger); Inbau, "Restrictions in the Law of Interrogation and Confessions", 52 Nw. U.L. Rev. 77-78 (1957). Because prosecutors in the District of Columbia review all cases before they are presented in court and *nolle prosse* those in which the evidence is likely to be suppressed,[24] the sanction of the Exclusionary Rule is remote neither in terms of time nor judicial authority from the offending officer.

Finally, the assumption that the Exclusionary Rule lacks effectiveness if not immediately and personally applied is itself questionable. Its deterrent effect operates indirectly as well:

---

[22]That was the point of Chief Judge Bazelon's concurrence below: "For now, it suffices for me that when an officer conducts a post-arrest in-custody search for protective purposes alone, he may not search objects that he has removed or that he can reasonably remove, from the control of the arrestee." (Pet. A. 53a)

[23]*I.e.*, the deterrent effect is most effective when the officer is aware that his error has damaged or destroyed the prosecution of the case (as he would be at the conclusion of the hearing of a motion to suppress, or when that hearing is not followed by a trial) and least effective when the sanction is applied years later by means of an appellate court reversal.

[24]Oaks, "Studying the Exclusionary Rule in Search and Seizure", 37 U. Chi. L. Rev. 665, 688-89 (1970).

"That the exclusionary device does not deter the individual searcher is not proof of its inefficiency. The rule operates to hold the prosecutor and the police chief responsible for illegal search by their investigators, and to punish the . in a real sense by marring their record of convictions and their reputation for effective and proper law enforcement."
Note, "Judicial Control of Illegal Search", 58 Yale L.J. 144, 162 (1948).

2. This court has held with increasing vigor that law enforcement officers must, wherever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, e.g., *Terry v. Ohio, supra*, 392 U.S. at 20 and cases cited therein. A primary effect of this court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), making the Exclusionary Rule applicable to state criminal proceedings was its beneficial effort on resort to search warrants. *See*, Kamisar "On The Tactics of Police-Prosecution Oriented Critics of the Courts" 49 Cornell L.Q. 436, 441 (1964), noting that in, for example, Minneapolis, only two search warrants had been issued between 1929 and 1961. If the Exclusionary Rule is relaxed so that only wilful invasions of privacy are forbidden, the incentive for a police officer to evade normal search processes–including normal warrant procedure–will increase. Indeed, if the Exclusionary Rule is susceptible of any restriction, it is with respect to searches which are conducted pursuant to warrant since in that situation an objective judiciary has already interposed itself between the citizen and the police. *Cf. Chimel v. California*, 395 U.S. 752, 761 (1969).

3. Whether or not the Exclusionary Rule has a measurable deterrent effect on police officers who would otherwise search without regard to the Constitution, it does–even according to its critics–have advantages for

which there are no ready alternatives. *See, Oaks, supra,* 37 U. Chi. L. Rev. at 756, "The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review [of alleged violations of constitutional rights] and it gives credibility to the constitutional guarantees." This purpose of enforcing the Constitution while preserving judicial integrity underlay the adoption of the Exclusionary Rule (*see, Weeks v. United States,* 232 U.S. 383, 393 (1914), holding that absent judicial enforcement, the Fourth Amendment "might as well be stricken from the Constitution.") and is as much its purpose today. *Mapp v. Ohio,* 367 U.S. 643, 655 (1961); *Terry v. Ohio,* 393 U.S. 1, 12-13 (1968). It is this function of the Exclusionary Rule which would totally vanish with even the "good faith" exception suggested by the Government; federal courts would be in the anomalous position of knowingly authorizing conduct proscribed by the Fourth Amendment. The suggestion that the Exclusionary Rule should be relaxed to prevent "guilty" persons from going free is nothing more or less than the argument that constitutional standards for obtaining evidence are too onerous:

> "If the rule allows unmerited acquittals, it does so only in the cases where the illegality is indispensible to the conviction. An after-the-fact prohibition on use of the evidence prevents convictions in no greater degree than would effective prior direction to police to search only by legal means . . . . [T]he maintenance of existing standards by means of exclusion is not open to attack unless it can be doubted whether the standards themselves are necessary."

Note, "Judicial Control of Illegal Searches," 58 Yale L.J. 144, 161-62 (1944).[25]

Additionally, the suggestion that the admissibility of illegally obtained evidence should turn on the good or bad faith of the arresting officer invites a subjective analysis inappropriate to Fourth Amendment problems. *Chimel v. California*, 395 U.S. 752, 764-75 (1969). There is already an unfortunate leeway in this area in which "good faith" operates: the admissibility of evidence uncovered during a stop-and-frisk depends on whether the officer conducting it was justified, *in the light of his own personal prior experience as a police officer*,[26] in inferring first that the suspect was potentially dangerous, and second that the articles that he extracted during the pat-down were arguably weapons. Especially in this latter

[25]That is the same point made by former California Supreme Court Justice Roger Traynor, in explaining why California judicially adopted the Exclusionary Rule six years prior to this Court's decision in *Mapp v. Ohio*:

"[T]he guilty go free if the evidence necessary to convict could only have been obtained illegally, just as they would go free if such evidence were lacking because the police had observed the constitutional restraints upon them. It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence." Traynor, "*Mapp v. Ohio* At Large In The Fifty States", 1962 Duke L.J. 319, 322 (1962).

[26]"The Court [in *Terry v. Ohio*] accepted with equanimity the testimony of the officer that he merely sensed that the two were up to no good. Noting that the officer had thirty-nine years experience as a policeman, the Court left no doubt that it would honor such experience and expertise in appraising the reasonableness of the conclusions and actions of the officer. 392 U.S. at 5." Cook, "The Art of Frisking", 40 Ford. L. Rev. 789, 790 n.9 (1972).

regard, any experienced police officer could in imaginative good faith believe that a soft bulge in the suspect's pocket was in fact a weapon.[27] And, of course, the fact that the arresting officer was not motivated by malice would be small consolation to the incarcerated victim of an unconstitutional search.

Finally, if the remedy of exclusion is severe, it is because the right protected by that remedy is so precious. As this Court has recently stated in the context of ordering dismissal of an indictment because the petitioner's Sixth Amendment right to a speedy trial was violated, "Indeed . . . it means that a defendant who may be guilty of a serious crime will go free . . . but such severe remedies are not unique in the application of constitutional standards." *Strunk v. United States*, 41 L.W. 4794, 4795 (June 11, 1973) (citation omitted).

---

[27]Cook, *supra*, Note 26, at 796-798. The California Supreme Court has condemned this type testimony:

"To permit officers to exceed the scope of a lawful pat-down whenever they feel a soft object by relying upon mere speculation that the object might be a razorblade concealed in a handkerchief . . . or any other atypical weapon would be to hold that possession of any object, including a wallet, invites a plenary search of an individual's person." *People v. Collins*, 1 Cal.3d 658, 463 P.2d 403, 406, 83 Cal. Rptr. 179 (1970) (en banc).

CONCLUSION

For the reasons set forth above, counsel for respondent respectfully submit that the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed. Additionally, counsel thank the Court for the privilege of representing respondent in this *in forma pauperis* appeal.

JOSEPH V. GARTLAN, JR.
DOROTHY SELLERS
1801 K Street, N.W.
Washington, D.C. 20006
(202) 833-3700
Counsel for Respondent

23 July 1973